UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL K. DARCY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 95-357-P-DMC***
	)	
TOWN OF NORWAY, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON
DEFENDANTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT[1]

The plaintiff is a former part-time police officer with the defendant Town of Norway ("Town") who, upon seeking promotion to a fulltime job in 1993, not only failed to get the post but was discharged from his part-time position when certain undisclosed facts about him came to light during a background investigation. His complaint challenges both his non-promotion and his firing, as well as what he contends were certain statements made about him that affected his subsequent search for employment elsewhere. The plaintiff asserts claims alleging the deprivation of his due process and privacy rights as secured by the U.S. Constitution and as actionable pursuant to 42 U.S.C. § 1983, age discrimination in violation of federal and Maine law, defamation, common-law invasion of privacy, infliction of emotional distress and tortious interference with advantageous relationships.

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

Defendant Cathleen Manchester has filed a motion to dismiss and/or for summary judgment, which the court will treat simply as a summary judgment motion. *See* Fed. R. Civ. P. 12(b) (providing for such treatment when matters outside pleadings submitted). The Town, joined by defendants David Holt and Alan Afflerbach, has filed a separate summary judgment motion.[2] For the reasons that follow, the motions are granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*,

[2] These defendants point out that the complaint, read literally, seeks to recover damages from the Town only. They therefore contend that the individual defendants are entitled to judgment in their favor. Inasmuch as the complaint recites the factual basis for asserting claims against each of the defendants, it would be inconsistent with the concept of notice pleading to dismiss all claims against the individual defendants based on the asserted defect. *See Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 865 (1st Cir. 1993) (all complaint must state is "short and plain statement of the claim," a minimal requirement) (quoting Fed. R. Civ. P. 8(a)).

917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

The summary judgment rule requires that affidavits submitted in support of or in opposition to such a motion be made on personal knowledge, setting forth "such facts as would be admissible in evidence" and must "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R.Civ. P. 56(e). Invoking this requirement, Manchester moves pursuant to Fed. R.Civ. P. 12(f) to strike portions of three affidavits submitted by the plaintiff. Manchester contends this material is not based on personal knowledge and amounts to speculation and hearsay.

Rule 12(f) authorizes the court to strike "redundant, immaterial, impertinent, or scandalous matter" from any "pleading." An affidavit is not a pleading within the meaning of Rule 12 and a Rule 12(f) motion to strike is not an appropriate vehicle for bringing deficiencies in an affidavit to the attention of the court. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1380 at 644 (1990). The motion to strike is therefore denied. To the extent that factual assertions contained in any affidavit reflect speculation and hearsay, I do not credit them in my recitation of the relevant facts.

In her motion to strike, Manchester contends the court may not credit assertions in two affidavits submitted by the plaintiff in which the affiant reports having heard Afflerbach make certain statements. Manchester takes the position that these assertions would be inadmissible at trial as hearsay. I disagree. To be hearsay, a statement must be offered in evidence "to prove the truth

of the matter asserted." Fed. R. Evid. 801(c). These affiants would be competent to testify to the fact of having heard Afflerbach make certain statements, so long as proving the truth of Afflerbach's statements were not the purpose of the testimony. Moreover, to the extent that any of Afflerbach's statements would be offered at trial against him as a defendant, they would be admissible as admissions of a party-opponent pursuant to Fed. R. Evid. 801(d)(2)(A). It is also possible that such statements could be imputed to the Town as Afflerbach's employer. *See id.* at (d)(2)(D) (concerning statement by servant of party concerning matters within scope of employment). I therefore credit these challenged statements to the extent they are deemed relevant.

II. Factual Context

Viewed in the light most favorable to the plaintiff as the non-moving party, the relevant facts may be summarized as follows: At all times material to this lawsuit, defendant Holt was town manager of the defendant Town of Norway, defendant Manchester was the Town's chief of police and defendant Afflerbach was a lieutenant with the Town's police department. Complaint (Docket No. 1a) at ¶¶ 3-5; Amended Answer (Docket No. 31) at ¶¶ 3-5. On October 10, 1992 the plaintiff completed a "personal history statement" in connection with his application for employment with the Town. Affidavit of Cathleen A. Manchester ("Manchester Aff."), Exh. 1 to Defendant Cathleen Manchester's Statement of Uncontroverted Facts ("Manchester SMF") (Docket No. 12), at ¶ 2. The plaintiff answered "yes" to the question asking whether he had ever been convicted, arrested, detained by police or "summonsed" into court. Exh. A to Manchester Aff. at 7. Asked by the questionnaire to provide details, the plaintiff reported only a 1981 arrest in Maine on a charge of reckless use of a firearm, adding a notation that the grand jury failed to return an indictment on the charge. *Id.* Elsewhere in the questionnaire, the plaintiff answered affirmatively when asked if he

had ever sold or furnished drugs or narcotics to anyone. *Id.* at 14. He reported having given "pot" to friends when using the drug on "very few occasions" in the 1960s and 1970s. *Id.* He also disclosed that he entered an alcohol treatment program voluntarily in 1981 after his arrest, and that he had been "clean and sober 100%" ever since. *Id.* The signature page of the form included this statement:

> I hereby certify that there are no willful misrepresentations, omissions, or falsifications in the foregoing statements and answers to questions. I am fully aware that any such misrepresentations, omissions, or falsifications will be grounds for immediate rejection or termination of employment.

Id. at 16. After completing the application and process, the Town hired the plaintiff as a part-time "reserve" police officer. Manchester Aff. ¶ 3.

In the summer of 1993 the plaintiff sought employment with the Town as a fulltime police officer. Deposition of Michael K. Darcy ("Darcy Dep.") at 5. The Town was seeking to hire two new fulltime officers from a pool of applicants that included the plaintiff. Manchester Aff. ¶ 4. The application process for these positions required the candidates to submit to a polygraph examination conducted by the Lewiston Police Department. *Id.*

The plaintiff submitted to the polygraph examination on October 20, 1993 and the results were forwarded to Manchester as chief of police. *Id.* at ¶ 5. The written results comprise notes taken by the examiner on a pre-printed form in response to questions answered by the plaintiff. Affidavit of Michael K. Darcy ("Darcy Aff.") (Docket No. 22) at ¶ 19. In connection with the examination, according to the written report of it, the plaintiff disclosed to the examiner that he had used marijuana, "has[h]/hash oil" and "speed" "a lot," that he had used cocaine 20 times, that he had used heroin, mescaline and "acid/LSD" less than ten times, and that he had used "magic mushroom" six to eight times. Manchester Aff. at ¶ 5; Exh. B to Manchester Aff. at 9. According to the plaintiff's

responses, the most recent of this drug use ended in 1981. Exh. B to Manchester Aff. at 9. The report further states that the plaintiff had both purchased and sold illegal drugs for personal use.[3] *Id.* Other disclosures made in connection with the polygraph test involved the plaintiff's criminal history. The plaintiff noted that during the late 1960s and early 1970s he had been involved in at least six incidents of disorderly conduct and/or assaults, all involving intoxication, in Massachusetts. *Id.* at 16. The Plaintiff also revealed a 1972 incident that took place in the province of Prince Edward Island, Canada.[4] *Id.* As it appears in the notes of the examiner, this incident involved an "assault on [a] police off[icer]" for which the plaintiff was expelled from college and deported to the United States. *Id.* There is also a notation that appears to read "2mts Jail." *Id.* The incident at Prince Edward Island actually involved an assault on a "peace officer," i.e., a security guard, whom the plaintiff shoved at a college hockey game. Darcy Aff. at ¶ 29. The plaintiff spent two nights in jail immediately following his arrest, but served no jail time in connection with the conviction. *Id.* at ¶ 30. Instead, he paid a $150 fine. *Id.* at 31.

Upon learning the results of the polygraph exam, Manchester directed Afflerbach to conduct an investigation. Manchester Aff. at ¶ 12. Afflerbach prepared a form authorizing the release of personal information about the plaintiff. Affidavit of Alan Afflerbach ("Afflerbach Aff.") (Docket No. 17) at ¶ 5. The plaintiff never signed this form. *Id.* Afflerbach, or someone acting under his direction, forged the plaintiff's signature on the release and faxed it to Prince Edward Island

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[3] Viewing the record in the light most favorable to the plaintiff, this is not a true statement. The plaintiff avers that he has never sold drugs, nor did he indicate to the examiner or to anyone else that he had ever done so. Darcy Aff. at ¶ 23.

[4] According to the plaintiff, he revealed two "misdemeanor offenses in the country of Canada" during his polygraph examination, one of them being the assault. Darcy Aff. at ¶ 21. It is not clear from reviewing the written record of the polygraph examination what other incident in Canada the plaintiff revealed.

University.[5] Darcy Aff. at ¶ 32. Manchester did not have any knowledge that someone other than Darcy had signed the release form until the plaintiff complained that his signature had been forged and Manchester learned of the problem from Holt. Manchester Aff. at ¶ 12.

After receiving the release, the registrar of the university sent a letter to defendant Afflerbach noting that the plaintiff had been dismissed from the university in "April 1992"[6] and that he had been deported from Canada in April 1972. Darcy Dep. at 161 and Exh. 10 thereto at 1. There is also a notation that the plaintiff entered Canada illegally in May 1972 and, it appears, traveled to Halifax, Nova Scotia.[7] Exh. 10 at 1. This notation refers to "four assault charges by students." *Id.* The registrar also reported that "other correspondence in the file indicates that the University took this case extremely seriously." *Id.* at 2.

In addition to the letter from the university registrar, the release also led to the police department's receiving a court record of the plaintiff's criminal conviction in Canada for assaulting a peace officer. Darcy Dep. at 160; Exh. 10 thereto at 9. The department also received

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[5] The form itself does not appear in the record. Afflerbach states that he prepared the form and that, "[a]dmittedly, the Plaintiff did not sign that document himself." Afflerbach Aff. at ¶ 5. Viewed in the light most favorable to the plaintiff, the record supports the inference the plaintiff draws that his signature was forged by Afflerbach or someone acting under his direction.

The Town, Holt and Afflerbach ask the court to credit for summary judgment purposes their assertion that Afflerbach "had a good-faith belief that the Town had a [valid] release from Mr. Darcy to collect information about him" but that Afflerbach simply did not have access to the release. Defendants Town of Norway's, David Holt's and Allan Afflerbach's Statement of Undisputed Material Facts, etc. (Docket No. 15) at ¶¶ 16-17 (citing Afflerbach Aff. at ¶ 4). As discussed, *supra*, this raises a genuine issue of material fact and I do not, for summary judgment purposes, credit Afflerbach's assertion that the forgery took place as the result of his good faith.

[6] Given the context, it appears this is a typographical error and that the registrar intended to state that the plaintiff had been dismissed in April 1972.

[7] According to the plaintiff, this incident never occurred and, in fact, he never traveled to Halifax in May 1972 or otherwise returned to Canada following his deportation. Darcy Dep. at 166.

correspondence indicating that the plaintiff's efforts to reenter Canada legally and to return to the university were unsuccessful. Exh. 10 at 4-6. The department received records of the University's security department indicating that the plaintiff had committed four on-campus offenses (possession of liquor, unlawfully setting a fire alarm, unlawfully entering a women's living quarters and creating a disturbance) that were adjudicated by the university's student judiciary court. Darcy Dep. at 174; Exh. 10 thereto at 8. And the department received an abstract of two convictions, both bearing the date May 18, 1972, apparently for drunkenness and disturbing the peace. Exh. 10 at 7. The record does not reveal the location of these incidents or the source of this abstract.

Some, but not all, of the damaging information the police department received as a result of using this forged release comprised information that the plaintiff had already disclosed during his polygraph examination or on other previous occasions during his employment with the town. Darcy Dep. at 154.

Afflerbach interviewed the plaintiff after receiving the information described in the previous paragraphs. Darcy Aff. at ¶ 32. He told the plaintiff that the department already knew about his history of drug and alcohol abuse, and assured him the department would not make an issue of it. *Id.* at ¶ 33. He indicated, however, that the plaintiff would not be able to "get out of" the fact that he was a felon. *Id.* The plaintiff told Afflerbach that he was not a felon and had never pleaded guilty or been convicted of a serious offense in any jurisdiction. *Id.*

The plaintiff met thereafter with Manchester. *Id.* at ¶ 34; Manchester Aff. at ¶ 13. When the plaintiff arrived at Manchester's office for this meeting, she was speaking there with Holt and Afflerbach. Darcy Aff. at ¶ 34. Manchester told the plaintiff the three had been discussing the issue

of the plaintiff's felony record.[8] *Id.* While the plaintiff was present at this meeting, Manchester called the Bureau of Alcohol, Tobacco and Firearms to inquire about whether the plaintiff was considered a felon under federal law in light of his conviction in Canada. Manchester Aff. at ¶ 13. The plaintiff was not aware of the information that Manchester received during this conversation. Darcy Aff. at ¶ 35. The person or persons with whom Manchester spoke told her that the plaintiff would be considered a felon given his record in Canada and, therefore, could not legally carry a firearm in the U.S. Manchester Aff. at ¶ 13. Manchester also had conversations with officials of the Maine Attorney General's office and the Maine Criminal Justice Academy concerning the plaintiff's ability to maintain his certification as a police officer in Maine, *id.*, but the record does not reveal whether these conversations took place prior to Manchester's meeting with the plaintiff, nor does it reveal what information or advice Manchester received from these state authorities.

Manchester thereafter typed a letter of resignation and instructed the plaintiff to sign it.[9] Darcy Dep. at 15-16 and Exh. 5 thereto. Manchester told the plaintiff that if it were proven he was not actually a felon he would still be under consideration for a position with the police department, and would even be a top candidate for a community policing job she believed would soon receive grant funding. Darcy Aff. at ¶ 36. She also wrote a letter to the Royal Canadian Mounted Police,

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[8] Viewing the record in the light most favorable to the plaintiff, it is therefore not possible to conclude that neither Holt nor Afflerbach were involved in the decision to terminate the plaintiff's employment notwithstanding each's sworn statements to that effect. *See* Affidavit of David Holt ("Holt Aff.") (Docket No. 18) at ¶ 2 ("I was not involved in any way in the decision to request the Plaintiff's resignation . . . apart from being informed by the Chief of her decision"); Afflerbach Aff. at ¶ 10 ("I was not involved in any way in the decision to request the Plaintiff's resignation").

[9] This is a disputed issue of material fact. Manchester's version of what occurred is that she typed the resignation letter and then gave the plaintiff the option of signing it. Manchester Aff. at ¶ 14. However, Manchester also states that she "knew it would be necessary for the Town of Norway to not hire Plaintiff as a full-time police officer, and also to terminate him as a part-time officer." *Id.*

praising the plaintiff as "a caring devoted community member," citing his "significant contributions to our community" and urging that he receive a pardon from Canadian authorities. Manchester Aff. at ¶ 18 and Exh. G thereto.

The plaintiff hired a Canadian attorney in an effort to vindicate his position that he was not a felon. Darcy Dep. at 20. The attorney ultimately provided Manchester with a copy of a letter, dated November 22, 1993, from the deputy police chief of Charlottetown, Prince Edward Island. Manchester Aff. at ¶ 17 and Exh. F thereto. The Charlottetown police official confirmed the fact of the plaintiff's 1972 assault conviction, entered by guilty plea, but also stated:

> Given the circumstances indicated in [the court records], this matter would have been dealt with as a summary conviction offence. . . . Further, it is our understanding that a summary conviction offence in Canada, would be treated as a misdemeanour offence in the United States.

Exh. F at 1. After it thus became doubtful whether the plaintiff was, in fact, a felon for purposes of U.S. law, Manchester continued to regard the plaintiff as unsuitable for employment as a police officer because he had been untruthful on his original employment application in 1992. Darcy Aff. at ¶ 38.[10]

Several months later, the plaintiff saw Holt and Afflerbach at a local restaurant. *Id.* at ¶ 39. Afflerbach approached the plaintiff and asked him why he was continuing to pursue the matter of his employment with the Town and why the problem, in the words of the plaintiff, "couldn't simply

[10] What the plaintiff actually states in his affidavit on this point is the following: "After it was proven that I was not a felon, Chief Manchester took the position that I was not fit to be a police officer for the Town of Norway because I had been untruthful on my application in 1992." Darcy Aff. at ¶ 38. Since the plaintiff has indicated that this statement is based on his personal knowledge, I take it to be a sworn assertion that he personally heard Manchester make a remark to that effect.

be resolved instead of my proceeding with any type of notice of claim and/or litigation."[11] *Id.* at ¶ 39. Afflerbach and the plaintiff were walking through the restaurant toward the cashier when they approached the table occupied by Holt and another person not identified in the record. *Id.* at ¶ 40. Holt began to laugh and, addressing Afflerbach, said something to the effect that a person is judged by the company he keeps and that Afflerbach should therefore not be in the company of a convicted felon. *Id.* at 41; Darcy Dep. at 47. The plaintiff left, waited in the parking lot for Afflerbach, and asked the lieutenant why he was continuing to be referred to as a convicted felon. Darcy Aff. at ¶ 41. Afflerbach responded that Holt was referring to his own sister as a convicted felon and not to the plaintiff.[12] *Id.*

One of the other applicants for the fulltime post sought by the plaintiff was Zane Loper. Affidavit of Zane Loper ("Loper Aff.") (Docket No. 24) at ¶ 3. Like the plaintiff, Loper was then a part-time police officer with the Town but was not successful in his bid for fulltime work with his employer. *Id.* at ¶¶ 2, 3. During the fall of 1993, Loper heard Afflerbach say that the plaintiff would not be hired as a fulltime officer because of his background in Canada. *Id.* at ¶ 4. Prior to this, Loper was unaware that the plaintiff had any problems with his background. *Id.* At some

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[11] The record reflects that the plaintiff submitted a notice of claim, pursuant to the Maine Tort Claims Act, dated April 29, 1994. Exh. 4 to Manchester SMF. The record does not reveal when the notice of claim was received.

[12] Holt's version of this incident is as follows:

> I was at the Fair Street Restaurant on one occasion introducing my sister to Chief Afflerbach at which time I stated that he better watch out for my sister because "she is a criminal." I was specifically referring to my sister when I said this and I meant it as a joke because my sister is very law-abiding.

Holt Aff. at ¶ 12; *see also* Afflerbach Aff. at ¶ 20 (corroborating Holt's account). The questions of whether the word "felon" was used in this conversation and whether any such remarks pertained to the plaintiff are disputed issues of material fact.

unspecified time, Loper also heard Manchester say that the plaintiff's background was keeping him out of contention for a fulltime position. *Id.* at ¶ 6.

Kevin McCutcheon was working as a police officer with the Town during most or all of the time the plaintiff was also employed there. Affidavit of Kevin McCutcheon ("McCutcheon Aff.") (Docket No. 23) at ¶ 3. Between the time of the plaintiff's discharge and his own resignation in March 1994, McCutcheon heard Afflerbach refer to the plaintiff as a "felon" on more than one occasion. *Id.* at ¶ 5. During this period, McCutcheon also had more than one conversation with Manchester about the plaintiff. *Id.* at ¶ 6. Referring to the plaintiff, she told McCutcheon that the police department could not hire "felons." *Id.* At some unspecified time during his employment with the Town, McCutcheon had a conversation with Holt in which Holt told McCutcheon that he wanted to build a police department of young and able people who would stay with the department for a long time. *Id.* at ¶ 7. Holt told McCutcheon that this statement was "just between me and you" and added that if McCutcheon repeated it then Holt would deny having made it. *Id.*

After the end of his tenure with the Town's police force, the plaintiff sought employment with the Cumberland County Sheriff's Department. Darcy Dep. at 84. He took part in a series of interviews, went through a training program, submitted to another polygraph examination and was selected for a position that involved working as a "contract deputy" in the town where he resided. *Id.* at 84-85. He was sworn in, commissioned and told on a Friday afternoon to begin work the following Monday. *Id.* at 85, 86. While he was driving home, his wife received a call informing him that he should not report for his new job. *Id.* at 85. The decision of the sheriff's department to withdraw its offer of employment came after the department's personnel manager had a conversation with Manchester. *Id*. at 85-86.

The plaintiff was born on December 4, 1950. Exh. 2 to Darcy Dep. at 1. Therefore, at the time he first sought employment with the Town in October 1992 he was 41 years old and at the time of his non-promotion and discharge he was 42. As a result of the events giving rise to this lawsuit, the plaintiff has been in general counseling with his family physician. Darcy Dep. at 202, 204. He has not otherwise been in treatment with any counselor, psychiatrist, psychologist or other mental health professionals, nor has he been taking any medication in connection with mental heath problems. *Id.* at 201.

III. The Section 1983 Claims

The plaintiff contends that the facts surrounding his discharge and its aftermath give rise to a cause of action pursuant to 42 U.S.C. § 1983, which authorizes civil lawsuits to vindicate the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by any person acting "under color of any statute, ordinance, regulation, custom, or usage" of any state. Specifically, the plaintiff alleges the violation of his constitutional rights to due process and to privacy.

To the extent that the plaintiff presses a section 1983 claim to vindicate his constitutional right to privacy, the defendants are entitled to summary judgment in their favor. The Supreme Court has noted that "at least two different kinds of interests" are implicated in cases that purport to protect privacy. *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977). One branch, clearly not at issue here, involves "the interest in independence in making certain kinds of important decisions" in matters such as contraception, child rearing and family relationships. *Id.* at 599-600 and n. 26 (citations omitted). Another branch is "the individual interest in avoiding disclosure of personal matters." *Id.* at 599. There may be yet other realms that implicate the right to privacy. *See id*. at 599 n.24

(suggesting protection against "government compulsion" in certain circumstances as possible privacy right) (citation omitted); *Borucki v. Ryan*, 827 F.2d 836, 839 (1st Cir. 1987) (discussing "[z]ones of privacy" created by "specific constitutional guarantees" in First, Third, Fourth and Fifth amendments). But not every case that raises privacy issues does so under the rubric of the Constitution. *See, e.g., United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989) (discussing *Whalen* in context of privacy as protected by federal statute); *Scheetz v. The Morning Call, Inc*., 946 F.2d 202, 206-09 (3d Cir. 1991) (federal constitutional right to privacy distinct from privacy rights under federal statute or state common law), *cert. denied*, 502 U.S. 1095 (1992).

Although section 1983 provides a cause of action for the deprivation of rights secured by federal statutes as well as the federal Constitution, the plaintiff invokes no statutory authority in connection with the claim and I therefore assume he intends to allege violation purely of his constitutional rights. Indeed, the plaintiff does not discuss the privacy aspects of his section 1983 claim at all in his memorandum opposing the pending summary judgment motions. In these circumstances, the only plausible conclusion is that the plaintiff asserts no constitutional right to privacy that is distinct from whatever right to privacy he enjoys under the common law. His common-law right to privacy is discussed, *infra*, and the defendants are entitled to summary judgment in their favor on the privacy aspects of his section 1983 claim. *See id*. (information contained in police report not constitutionally protected); *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir.) (constitutional right to privacy "generally limited to only the most intimate aspects of human affairs") (citations omitted), *cert. denied*, 488 U.S. 854 (1988).

Concerning the due process aspects of the plaintiff's section 1983 claim, the defendants contend they are entitled to judgment in their favor because the plaintiff had no protected property interest in his employment by the Town. All defendants invoke the Law Court's decision in *Lynch v. Lewiston School Committee*, 639 A.2d 630 (Me. 1994), to argue that the plaintiff had no property interest in his requested promotion. The Town, Holt and Afflerbach contend that the plaintiff cannot assert a property interest in a job from which he voluntarily resigned. Further, while conceding that the plaintiff had a statutory right to termination only for just cause, after notice and hearing, they contend that the plaintiff's failure to challenge the administrative determination in state court is fatal to his federal claim here.

In *Lynch*, the Law Court held that, for purposes of the requirement of procedural due process, a property interest in continued employment arises "only on a showing of 'a legitimate claim of entitlement' to employment, which in turn arises from existing rules or 'mutually explicit understandings' generated by an independent source such as state law." *Id*. at 632 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (other citations omitted). As the plaintiff points out and as the Town, Holt and Afflerbach concede, such a mutually explicit understanding arises pursuant to 30-A M.R.S.A. § 2671(1) (providing that police officers may be removed for cause after notice and hearing). Although Manchester correctly points out that the plaintiff enjoyed no claim of entitlement to the fulltime position for which he was *not* hired, section 2671 does sufficiently generate a claim of entitlement to the position that he lost. *Small v. Inhabitants of the City of Belfast*, 796 F.2d 544, 550 (1st Cir. 1986).

The plaintiff's claim also survives the contention that a plaintiff cannot assert a due process right to a position from which he resigned. As I have already noted, viewing the record in the light most favorable to the plaintiff does not permit me to conclude that he resigned voluntarily.

Nor can I agree with the three defendants who so argue that the plaintiff is required to exhaust available state remedies before proceeding with an action under section 1983. In support of that position, the three defendants cite the Law Court's opinion in *Moreau v. Town of Turner*, 661 A.2d 677 (Me. 1995). In that case, the Law Court rejected the plaintiff's section 1983 claim stemming from his suspension as a municipal employee, noting that the plaintiff both rejected an invitation by the town's board of selectmen to address his concerns and then did not seek state court review as authorized by M. R. Civ. P. 80B. *Id.* at 680. The Law Court invoked its longstanding rule that "where state law provides adequate redress to a plaintiff deprived of a constitutionally protected property interest, no section 1983 action will lie." *Id.* (citations omitted).

As a general proposition, there is no rule that a plaintiff must exhaust available state-law remedies before pursuing a section 1983 claim. *Zinermon v. Burch*, 494 U.S. 113, 124 (1990) ("overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983"). However, the Court of Appeals for the First Circuit has held that the availability of a "plainly adequate remedy" under state law will defeat a section 1983 claim alleging a violation of procedural due process in connection with a malicious prosecution. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 (1st Cir. 1996); *see also Reid v. New Hampshire*, 56 F.3d 332, 336 n.8 (1st Cir. 1995); *Pérez-Ruiz v. Crespo-Guillén*, 25 F.3d 40, 43 (1st Cir. 1994). The principle articulated in these authorities has its genesis in the so-called *Parratt* rule, which applies to cases in which the due process violation is occasioned by "a random and unauthorized act by a

state employee." *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 328 (1986). In such a situation, "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." *Zinermon*, 494 U.S. at 128.

The firing of a municipal employee with a statutorily-created property interest in his employment is not a random act within the meaning of *Parratt* and a different rule therefore applies. Indeed, the factual scenario presented here strongly resembles that of *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). In that case, a state-employed security guard filled out an employment application and indicated that he was not a convicted felon; it later emerged that he had, in fact, been convicted of grand larceny some 11 years previously. *Id.* at 535. He was dismissed for dishonesty in filling out the application, but without being afforded an opportunity to respond or to challenge the determination. *Id.* Loudermill appealed to the state civil service commission, arguing that he had thought the conviction was for a misdemeanor rather than a felony. *Id.* The commission upheld the dismissal, Loudermill eschewed judicial review in state court, and he instead filed a section 1983 action alleging that the statute under which he was discharged was unconstitutional because it did not provide him with an opportunity to respond to the charges prior to dismissal. *Id.* at 536. The Supreme Court held that, in these circumstances, procedural due process requires "some form of pretermination hearing" notwithstanding the availability of post-termination state remedies. *Id.* at 542.

It may emerge, upon full development of the facts, that the actions taken by the defendants prior to the termination of the plaintiff amounted to a constitutionally sufficient "opportunity for the employee to present his side of the case." *Id.* at 543. But it would be inappropriate to make such

a determination at the summary judgment stage. On the issue of such pre-termination opportunity to be heard, the record presently yields only a meeting with Manchester during which she made an admittedly relevant telephone inquiry but without revealing the details to the plaintiff. The rules applicable on summary judgment also require me to draw the inference that the reason for the plaintiff's dismissal mutated when the defendants learned that he was probably not a convicted felon, and became dishonesty in filling out his employment application -- notwithstanding an assurance that the Town was aware of the plaintiff's background and would not hold him accountable for it. The facts, viewed in the light most favorable to the plaintiff, do not comport with the requirement of a pre-dismissal opportunity to be heard.

Moreau is therefore distinguishable. That case turned on the plaintiff's failure to address his objection to a suspension despite an invitation from the board of selectmen to do so at a hearing. *Moreau*, 661 A.2d at 680. The case simply does not speak to the question of a dismissal, imposed without an invitation by the municipal authorities to appear for a hearing and explain one's concerns fully. Without such an opportunity, a plaintiff has not received the "adequate redress" that would defeat his section 1983 claim pursuant to *Moreau*. *Id.*

The Town invokes the principle, set forth in *City of Canton v. Harris*, 489 U.S. 378 (1989), that section 1983 liability cannot be premised on the theory of *respondeat superior*. *Id.* at 385. As the Supreme Court reemphasized in that case, a municipality may be liable under section 1983 only when its "policy or custom" causes the injury to the plaintiff. *Id.* (citations omitted). The Town contends that nothing in the record here suggests a municipal policy or custom that caused a deprivation of the plaintiff's rights. In response, the plaintiff relies on the First Circuit's opinion in *Small* and its holding that a municipality could be liable for its city manager's decision to fire a

police officer if, in fact, the city manager had the final authority to revoke the appointment. *Small*, 796 F.2d at 553; *see also Harrington v. Almy*, 977 F.2d 37, 45 (1st Cir. 1992) (single decision can be municipal "policy" for section 1983 purposes "if it is made by the official charged with the final responsibility for making it under local law") (citations omitted); *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1233-35 (D. Me. 1996) (police chief's conduct can be imputed to town if he is "policymaker"). As in *Small, Harrington* and *Comfort*, I am unable to conclude as a matter of law that the person who decided to fire the plaintiff -- either Manchester or, possibly, Holt -- was not an official with sufficient policymaking authority such that her or his actions may be imputed to the Town. Summary judgment in favor of the Town is therefore inappropriate.

The three jointly-appearing defendants contend that Holt and Afflerbach, as individual defendants, are entitled to qualified immunity from the plaintiff's section 1983 claim because neither participated in the decision to fire the plaintiff and because the plaintiff resigned voluntarily. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (noting that test is "objective reasonableness" of official's conduct). "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.*

The plaintiff agrees that the *Harlow* rule applies, but contends that the individual defendants' conduct was not objectively reasonable. I agree that summary judgment is not warranted as to Afflerbach and Holt based on qualified immunity. Contrary to the assertion of the Town, Holt and Afflerbach, the record does suggest that both Holt and Afflerbach were involved in the decision to

terminate the plaintiff -- Afflerbach by conducting an investigation, and both by virtue of their meeting with Manchester in the moments before his dismissal. Nor can I agree with these defendants that the record demonstrates that the plaintiff was not fired. This is the only basis for their asserted immunity, as they do not suggest that there was no clearly established right of the plaintiff to procedural due process in connection with his firing in 1993, as indeed they cannot. *See Small, supra*. While the *Harlow* rule is designed to prevent "excessive disruption of government" by weeding out "insubstantial" claims against municipal officials, *Harlow*, 547 U.S. at 818, this is not such a claim.[13]

Finally, the Town, Holt and Afflerbach seek judgment in their favor to the extent the plaintiff's section 1983 claim seeks punitive damages. They contend that the Town cannot be liable as a municipality for punitive damages on a section 1983 claim. I agree. *See City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 271 (1981). These defendants also assert that Holt and Afflerbach are not liable for punitive damages on the section 1983 claim because the plaintiff cannot prove the requisite level of misconduct. The Supreme Court has held that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected

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[13] This, of course, does not apply to the contention of the three jointly-appearing defendants that discretionary immunity shields Holt and Afflerbach from liability in connection with the privacy aspects of the plaintiff's section 1983 claim. Having already determined that the privacy aspects of the section 1983 claim must fail, I need not address the issue of discretionary immunity as it relates to the plaintiff's assertions regarding his constitutional right to privacy.

Manchester does not contend that she is immune from section 1983 liability. Instead, she takes the position that "as a mere supervisor and not an employer, she cannot be held liable for hiring/firing decisions for which only the employer is legally responsible." Defendant Cathleen Manchester's Motion to Dismiss or for Summary Judgment and Incorporated Memorandum ("Manchester Memorandum") (Docket No. 11) at 18. This, of course, is at variance with the plain meaning of section 1983 itself, which applies to "[e]very person" who acts under color of state law.

rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Given this standard, not every valid section 1983 claim is one for which punitive damages are appropriate. The court may withhold the issue of punitive damages from the factfinder in a case where the challenged conduct, though actionable, "do[es] not form the basis for awarding additional compensation over and above compensatory damages in order to punish or deter [the actors] from future violations." *Davet v. Maccarone*, 973 F.2d 22, 28 (1st Cir. 1992). This is such a case, at least as to the surviving aspects of the section 1983 claim, which relate solely to the decision to discharge the plaintiff from employment (as distinct, for example, from Afflerbach's use of the forged release to obtain personal information about the plaintiff, the comments of Holt and Afflerbach to third parties suggesting that the plaintiff is a felon, or even Manchester's refusal to rehire the plaintiff once doubts emerged as to the nature of his criminal record). Viewing the record evidence in the light most favorable to the plaintiff, there is nothing in the summary judgment record relating to the involvement of Holt and Afflerbach in the personnel decision at issue from which a factfinder could infer evil motive, evil intent, or reckless indifference to the plaintiff's federally protected rights.

IV. Age Discrimination

Count II of the plaintiff's complaint alleges that his discharge and non-promotion to fulltime status are in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., and the analogous provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4571 *et seq*. The defendants all invoke this court's decision in *Quiron v. L.N. Violette Co.*, 897 F. Supp. 18 (D. Me. 1995), to contend that supervisory employees are not subject to liability under either statute. *See also Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 36 and n.6 (D. Me. 1995) (to same effect, rejecting conflicting authority from other circuits concerning ADEA, acknowledging lack of

Law Court precedent directly on point, but noting that Law Court generally uses federal precedent to interpret Human Rights Act). The plaintiff does not suggest that *Quiron* was wrongly decided and, indeed, appears to concede that his age discrimination case is premised solely on the Town's liability. The individual defendants are therefore entitled to summary judgment in their favor on the plaintiff's age discrimination claim.

I cannot, however, agree that the Town is entitled to summary judgment on this claim because the plaintiff has failed to make out a *prima facie* case of age discrimination. Specifically, the Town contends that the plaintiff cannot show that age was a substantial factor in his dismissal.

In resisting a motion for summary judgment on an age discrimination claim, the plaintiff must "show evidence sufficient for a factfinder to reasonably conclude that [the defendant's] decision to terminate [and not to promote] was driven by a discriminatory animus." *Mulero-Rodriguez v. Ponte, Inc*., 1996 WL 606509 at *2 (1st Cir. Oct. 28, 1996) (citation omitted). The record must be "devoid of adequate direct or circumstantial evidence of the employer's discriminatory intent." *Id.* (citation omitted). In this instance, Holt's comments as made to a fellow employee, to the effect that the Town wished to restock its police force with young officers, is the sort of circumstantial evidence from which a factfinder could infer the requisite discriminatory animus on the part of the Town.[14] This is so even though, as the Town points out, there is no evidence suggesting that Manchester was motivated by discriminatory animus and the record certainly suggests that other factors loomed large in the employment decision at issue in this litigation.

[14] Although Manchester, as police chief, was the person who informed the plaintiff that he was being fired, the meeting she held with Holt and Afflerbach immediately before doing so is itself sufficient circumstantial evidence from which a factfinder could infer that Holt, as town manager, played a substantive role in the decision.

V. State-Law Discretionary Function Immunity

In resisting the plaintiff's four state-law tort claims, Manchester invokes 14 M.R.S.A. § 8111(1), which is the provision of the Maine Tort Claims Act providing that employees of government entities are "absolutely immune from personal civil liability" for, *inter alia*, "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused." *Id.* at subsection (1)(C). Section 8111 also provides such employees with such immunity for "[a]ny intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith." *Id.* at subsection (1)(E). The Town, Holt and Afflerbach also invoke section 8111 in asserting that Holt and Afflerbach are immune from the plaintiff's tort claims, but do not contend that the Town enjoys immunity notwithstanding the broad grant of sovereign immunity contained in the Tort Claims Act. *See* 14 M.R.S.A. § 8104-B(3) (government entity "not liable" for claim resulting from "[p]erforming or failing to perform a discretionary function or duty, whether or not the discretion is abused"). The plaintiff responds by asserting that the individual defendants were acting outside the scope of their employment and in bad faith.

The Law Court has recently held that the publishing of defamatory statements is not a discretionary function within the meaning of section 8111, even if the falsehood itself grew out of an investigation that was itself one of the speaker's discretionary functions. *Rippett v. Bemis*, 672 A.2d 82, 88 (Me. 1996). The court noted that such a public statement, concerning the results of an investigation, was "not essential to accomplish any basic government policy, program, or objective and in fact violated a written policy of the [employer]." *Id.* The furtherance of a "basic governmental policy, program, or objective" is the touchstone of discretionary function immunity

in Maine Law, *see id*. (quoting *Miller v. Szelenyi*, 546 A.2d 1013, 1021 (Me. 1988), and I therefore conclude that *Rippett* is applicable here even though the record discloses no official policy of the Town concerning disclosure of data from employment investigations. Idle banter to the effect that a former town employee is a convicted felon advances no basic governmental policy, program or objective of which I am aware. Viewed in a plaintiff-favorable light, the record suggests that each of the individual defendants engaged in such banter, and none is therefore entitled to discretionary function immunity as to the claims arising out of these statements.

Concerning the allegation of forging or causing to be forged the plaintiff's signature on a release form, Afflerbach seeks to manufacture immunity for himself with a self-serving sworn statement to the effect that he acted in the good-faith belief that the Town had a valid release from the plaintiff to which Afflerbach did not have physical access at the time he conducted his investigation. Such an investigation is, of course, itself a discretionary function, and therefore Afflerbach is entitled to immunity for intentional acts committed in the investigation absent a finding that he acted in bad faith. A factfinder could certainly infer bad faith from the circumstances that surrounded this act. To permit a defendant to rebut conclusively such a possibility by executing a self-serving affidavit of good faith would eviscerate the "bad faith" exception to discretionary function immunity altogether. The question of Afflerbach's good or bad faith remains a disputed issue for trial.

VI. Defamation

All of the defendants contend that, notwithstanding any immunity, they are entitled to judgment in their favor as a matter of law on the plaintiff's defamation claim. Both summary judgment motions make the same general arguments: that any statements at issue were not false and

therefore not defamatory, that any statements were opinion and therefore non-actionable, that the individual defendants enjoyed a conditional privilege that immunizes them from the defamation claim, and that the plaintiff is a public figure whose defamation claim cannot meet the "actual malice" standard required by the First Amendment.

The tort of libel in Maine has four elements:

1) a false and defamatory statement concerning another;

2) an unprivileged publication to a third party;

3) fault amounting at least to negligence on the part of the publisher; [and]

4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Rippett, 672 A.2d at 86 (citation omitted). The record reveals only four statements made to a third party that are potentially defamatory: Holt's statement at the restaurant, made in the presence of Afflerbach, the plaintiff and a third person, referring to the desirability of not keeping company with convicted felons; Afflerbach's statement to Loper that the plaintiff would not be hired as a fulltime officer because of problems with the plaintiff's background, Afflerbach's references to the plaintiff as a "felon" in the presence of McCutcheon, and Manchester's statements to Loper about the plaintiff's background problems and her comment about the plaintiff to McCutcheon to the effect that the Town could not hire felons to work in its police department.

In a defamation case, "falsity is presumed and the defendant bears the burden of proving truth as an affirmative defense." *Haworth v. Feigon*, 623 A.2d 150, 158 n.6 (Me. 1993). The question of whether the plaintiff is, in fact, a convicted felon is not conclusively established by the defendants on the present record. The issue of whether the statements at issue were false therefore remains a disputed issue for trial.

However, the issue of whether the disputed statements amount to expressions of opinion is amenable to resolution now. Notwithstanding the longstanding principle that statements of opinion are protected from sanction by the First Amendment, *see, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea."), an expression of opinion may be actionable "if it implies the existence of undisclosed defamatory facts," *Staples v. Bangor Hydro-Electric Co.*, 629 A.2d 601, 603 (Me. 1993) (citation and internal quotation marks omitted). The Town, Holt and Afflerbach contend that a statement asserting the plaintiff is a felon is non-actionable in the circumstances of this case because such a statement amounts to "opinion based on disclosed, nondefamatory facts." Motion for Summary Judgment by Defendants Town of Norway, David Holt and Alan Afflerbach, with Incorporated Memorandum of Law (Docket No. 14) at 28. Similarly, Manchester contends that, having received the opinion from federal and state officials that the plaintiff's assault conviction made him a felon, she "could not simply accept the differing opinion of the police chief of Charlottetown, Prince Edward Island that the conviction should be treated as a misdemeanor under U.S. law." Manchester Memorandum at 9.

The defendants confuse factual uncertainty with opinion. To state, wrongly, that a person is a felon is not to articulate a "false idea" within the meaning of *Gertz*. Such a statement does more than imply undisclosed underlying facts; it boldly discloses something that no reasonable person would understand as anything other than a factual assertion. That it proved difficult for the defendants to verify that the plaintiff either is or is not a felon may be relevant to other aspects of the defamation claim, but it cannot turn fact into opinion.

Nor can I agree that any of the defendants enjoyed a conditional privilege to make any of the allegedly false statements about the plaintiff. "A conditional privilege may arise in any situation in

which an important interest of the recipient of a defamatory statement will be advanced by frank communication." *Rippett*, 672 A.2d at 87 (citation omitted). Further, a conditional privilege arises where an officer of a state or a subdivision thereof "makes a defamatory communication *required or permitted* in the performance of his official duties." *Id.* (emphasis in original) (quoting *Restatement (Second) of Torts* § 598A (1977)). Idle banter about a person's criminal record is not an official duty of any of the defendants, nor does it advance any important interest in any recipients of such communication.

However, the defendants are correct in their assertion that, because the plaintiff was a police officer, he is a public official for purposes of libel law. *See Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981) (police detective a "public official" in light of his "responsibility for the safety and welfare of the citizenry" and ability to carry firearm).

> The first amendment . . . requires that a "public official" who brings a defamation suit against critics of his "official conduct" prove "actual malice," that is, that the defendants made the statements with knowledge of their falsity or with reckless disregard of whether they were true or false.

True v. Ladner, 513 A.2d 257, 262 (Me. 1986) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-83 (1964)); *see also Roche*, 433 A.2d at 763 (statements that impugn officer's fitness for office subject to *New York Times* standard). The public-figure plaintiff must make his defamation case with proof by "convicting clarity," i.e., by clear and convincing evidence. *True*, 513 A.2d at 262 (citations omitted). The plaintiff presents no argument for why the court should deviate from these well-established principles.

The question whether the defendants acted with actual malice must nevertheless await full factfinding. I agree with the defendants that, prior to the receipt of the Canadian official's letter suggesting that the assault conviction was a misdemeanor, none of the individual defendants made

their statements about the plaintiff's record knowing they were false or with reckless disregard for their truth or falsity. But the plaintiff-favorable view of the record set forth, *supra*, supports the inference that the disputed statements came after the Town received this letter. The incident at the restaurant involving Holt and Afflerbach took place several months after the letter arrived. Loper heard Afflerbach's comments about the plaintiff during the fall of 1993, which could have been prior to the letter's arrival. McCutcheon heard Afflerbach refer to the plaintiff as a felon between the plaintiff's discharge and the time of his own departure in the spring of 1994 -- again, possibly after the letter's arrival. Finally, McCutcheon's conversations with Manchester took place during the same period, and the same temporal inference is possible. A factfinder could determine that these statements were made after these defendants were put on notice that the plaintiff might not be a felon, and therefore that the individual defendants acted with actual malice. Summary judgment on the defamation claim is therefore inappropriate.

VII. Invasion of Privacy

To withstand a motion for summary judgment on a claim of invasion of privacy, the plaintiff must present facts tending to show that the acts complained of "(1) intruded upon [his] physical and mental solitude or seclusion, (2) publicly disclosed private facts, (3) placed [him] in a false light in the public eye, or (4) appropriated [his] name or likeness for [the defendants'] benefit." *Loe v. Town of Thomaston*, 600 A.2d 1090, 1093 (Me. 1991) (citations omitted). In so holding, the Law Court has adopted the formulation set forth in the *Restatement (Second) of Torts*. *See Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977) (quoting *Restatement (Second) of Torts* § 652A). Here, the plaintiff resists summary judgment by contending that the first and third privacy interests described above suffered invasions by the defendants. The defendants contend the record is devoid of any such evidence.

The *Restatement* elaborates on the general principle set forth in section 652A with this description of the tort of "intrusion upon seclusion," one of the four types of privacy invasion recognized by the drafters: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement (Second) of Torts*, § 652B. In support of his assertion of invasion of privacy by intrusion, the plaintiff invokes the *Restatement* commentary to the effect that such a tort does not always involve the physical invasion of the plaintiff's home or other place of seclusion. Rather, "[i]t may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, . . . examining his private bank account, or compelling him by a forged

court order to permit an inspection of his personal documents." *Restatement (Second) of Torts*, § 652B cmt. b.

The Law Court stated in *Nelson* that a claim arising under this branch of the tort requires "physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion." *Nelson*, 373 A.2d at 1223. I do not, however, read *Nelson* as precluding liability of the sort described in the commentary cited above. *Nelson* involved a plaintiff who's complaint consisted purely of an allegation that a newspaper had published a child's photograph without permission. *Id.* The point being made by the court was that such an allegation, without some act of physical intrusion, is insufficient to state a valid claim. Nor is the plaintiff's claim defeated by the reality that the defendants' underlying purpose -- to investigate fully the plaintiff's background in light of the issues that emerged via the polygraph test -- may have had legitimacy. As one commentator has noted, [i]f the means used is abnormal in character for gaining access to private information, then the intrusion is likely to be actionable regardless of the purpose." W. Page Keeton et al., *Prosser and Keeton on Torts* (5th ed. 1984) § 117 at 856.

The Law Court has not directly spoken to the question. *But see Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 483 and n.19 (D. Me. 1987) (reading Maine law as requiring "at least an intrusion into a physical realm that is uniquely the plaintiff's, such as by wiretapping or opening private mail), *modified on other grounds*, 845 F.2d 347 (1st Cir. 1988). Case law from other jurisdictions suggests general acceptance of the concept that a tort is committed when a person uses deception, trickery or dishonesty to acquire documents or information of a personal nature about another, in some cases even in circumstances where the information is sought for a legitimate or socially useful purpose. *See, e.g., Birnbaum v. United States*, 588 F.2d 319, 323 (2d Cir. 1978)

(opening and copying by Central Intelligence Agency of mail to or from Soviet Union) (applying New York law); *Hall v. Harleysville Ins. Co.*, 896 F. Supp. 478, 484 (E.D.Pa. 1995) (obtaining credit histories by insurance companies investigating workers' compensation claim) (applying Pennsylvania law); *Miller v. Brooks,* 472 S.E.2d 350, 353-54 (N.C. App. 1996) (picking up plaintiff's mail by misrepresenting identity to post office); *Hillman v. Columbia County*, 474 N.W.2d 913, 919 (Wis. App. 1991) (noting that reading medical records an intrusion under *Restatement* § 652B but such records not a "place" within meaning of Wisconsin invasion-of-privacy statute); *Brex v. Smith*, 146 A. 34 (N.J. Chancery 1929) (noting common-law right to privacy in bank records). The Supreme Court of Oklahoma has held that no tortious invasion of privacy took place when a supervisor read and disseminated data about an employee's psychiatric treatment, noting that the data "was of legitimate concern to [the] supervisor." *Eddy v. Brown*, 715 P.2d 74, 75, 77 (Okl. 1986). But the information in question was already a part of the plaintiff's "employment medical records." *Id.* at 77. In *Robyn v. Phillips Petroleum Co*., 774 F. Supp. 587 (D. Colo. 1991), the court was willing to credit the possibility that a plaintiff's bank statement had improperly found its way into her personnel file; fatal to the invasion-of-privacy claim was the absence of evidence that the employer-defendant had taken any action based on its acquisition of the document. *Id.* at 591-92 (applying Colorado law). And the Third Circuit, applying Pennsylvania law, has held that the Veterans Administration did not invade a plaintiff's privacy by disclosing psychiatric records to his employer. *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989). The court credited the agency's belief that it had permission from the plaintiff to release the records, concluding that "an actor commits an *intentional* intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *Id.* (emphasis in original).

As I have already noted, the question of whether Afflerbach believed the Town had authority from the plaintiff to obtain academic records is at least a disputed issue of material fact. He certainly knew that he did not have a valid release in hand to transmit to the university in Canada, and likewise well understood that the release he ultimately transmitted to Canada did not bear the plaintiff's signature. The record suggests that at least some of the data obtained through the improper release was not already known to the defendants, and it is clear they acted upon it. The determination of whether Afflerbach and, through him, the Town invaded the plaintiff's privacy by intrusion must therefore await full factfinding.

However, Holt and Manchester are entitled to judgment in their favor on this claim. Nothing in the record suggests they participated or even knew about the transmission of the improperly completed release used to obtain the university records. And the plaintiff's claim of "false light" invasion of privacy must fail as to all defendants. The statement that the plaintiff was a "felon" was not publicly disseminated; it was the subject of casual conversation with selected individuals. In contrast to defamation, the tort of false-light invasion of privacy requires some kind of widespread distribution of information. *See Restatement (Second) of Torts*, § 652E (false-light invasion of privacy "limited to the situation in which the plaintiff is given publicity"); *id*. at § 652D cmt. a (contrasting "publicity" with "publication," defining the former as communicating to public at large "or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge"); *Rush v. Maine Sav. Bank*, 387 A.2d 1127, 1128 (Me. 1978) ("public disclosure" a "necessary element" of false-light privacy invasion).

VIII. Infliction of Emotional Distress

Count VI of the complaint is a claim for "infliction of emotional distress." Both summary judgment motions contend this claim fails as a matter of law because the record contains no evidence that the plaintiff suffered emotional distress of sufficient magnitude to justify recovery under Maine law, and no evidence of the kind of outrageous conduct required for such a claim. The plaintiff contends that such determinations are questions of fact for the jury.

In his opposition to the defendants' motion, the plaintiff states that his claim is one for both intentional and negligent infliction of emotional distress and cites case law arising under both torts. In my view, the only reasonable reading of the plaintiff's complaint is that he states a claim only for intentional infliction, inasmuch as all of the acts he alleges as the sources of his distress were intentional. *See* Complaint at ¶ 50 (referring to "publishing false statements," "forging" plaintiff's signature, "obtaining private information," "firing [plaintiff] without basis," "not hiring him due to his age and other inappropriate reasons" and "generally damaging his reputation"). All of the Maine cases involving negligent infliction of emotional distress involve some underlying assertion of garden-variety negligence of which the plaintiff was the victim either directly, *see, e.g., Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282 (Me. 1987) (discovery of human leg negligently placed in bag by hospital); *Devine v. Roche Biomedical Lab., Inc.*, 637 A.2d 441, 447 (Me. 1994) (*Gammon* extended scope of compensable damages to psychic injury but did not "give plaintiffs a license to circumvent other requirements of the law of torts"), or indirectly, *see, e.g., Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982) (mother who witnessed infant choke on foreign substance in baby food). The concept of notice pleading might permit the court to infer from the complaint an allegation that the defendants breached a duty of care owed the plaintiff, but the record contains no evidence of any negligent acts.

The claim for intentional infliction of emotional distress founders on the lack of evidence concerning the magnitude of any wrongs committed and the degree of injury suffered. To recover on such a claim, the plaintiff must demonstrate, *inter alia*, that the conduct of the defendants was

> so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious and utterly intolerable in a civilized community;" . . . and [that] . . . the emotional distress suffered by the plaintiff was "severe" so that "no reasonable [person] could be expected to endure it."

Colford v. Chubb Life Ins. Co. of America, 681 A.2d 1171, 1178 (Me. 1996) (citations omitted). While it is ultimately for the jury to determine whether the conduct complained of was extreme and outrageous, such a determination is "subject to the control of the Court," which must determine in the "first instance" whether no jury could reasonably regard the conduct in that manner or, alternatively, whether the record compels such a finding. *Id.* at 1179 (citation omitted).

The conduct alleged by the plaintiff of which there is sufficient record evidence for a jury to credit is of the same magnitude as that in *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499 (Me. 1989). In that case, the Law Court determined that the alleged conduct, i.e., humiliation of an employee and dismissal without case, fell "far short" of the requisite standard of outrageousness and that summary judgment was therefore appropriate. *Id.* at 501. The court so held notwithstanding the existence of a genuine factual issue as to whether the defendant had defamed the plaintiff by making a false accusation against him. *Id.*; *cf. Vogt v. Churchill*, 679 A.2d 522, 524 (Me. 1996) (affidavit describing "concerted, prolonged campaign," including malicious newspaper advertisements, sufficient to support attachment on intentional infliction claim). The wrongs discernable in the record here, though intentional, simply do not sink to the requisite level.

Even if they did, the injuries alleged by the plaintiff are also not of sufficient magnitude to permit the claim to go to the factfinder. To prevail, the plaintiff must demonstrate emotional distress

that is so severe that a reasonable person could not be expected to endure it. Although, in some cases, the severity can be inferred from the extreme and outrageous nature of the intentional conduct at issue, in most instances the tort requires manifestation of "shock, illness or other bodily harm." *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (citation omitted). In *Vicnire*, the plaintiff could not meet this standard by producing only evidence that he felt angry, nervous and "kind of down." *Id.* at 155. All that distinguishes this case from *Vicnire* is the bare fact that the plaintiff has had some general counseling sessions with his family physician. The case is not one in which the severity of the emotional injury can be inferred, and there is no evidence in the record from which a jury could conclude that any such injury was beyond the endurance expected of a reasonable person. The defendants are entitled to summary judgment on the claim of infliction of emotional distress.

IX. Interference with Advantageous Relationships

Count VII of the plaintiff's complaint seeks to recover damages for acts of the defendants that the plaintiff contends amount to "interfering with Plaintiff's employment." Complaint at ¶ 59. Specifically, the plaintiff alleges that he would have been employed by one or more other law enforcement agencies subsequent to his discharge by the Town, but for "untrue allegations" made by the defendants in response to inquiries from these other employers. Manchester contends the plaintiff cannot recover on this count because he has not come forward with evidence of fraud or intimidation. The other defendants contend that evidence is lacking of any requisite contractual relationships.

The Law Court describes this tort as "[i]nterference with an advantageous relationship" and has recently reemphasized that it "requires the existence of a valid contract or prospective economic

advantage, interference with that contract or advantage through fraud or intimidation, and damages proximately caused by the interference." *Shaw v. Southern Aroostook Community School Dist.*, 1996 WL 592973 at *1 (Me. Sept. 30, 1996) (citation omitted). Although, as the Town, Holt and Afflerbach allege, the relationship between the plaintiff and the Cumberland County Sheriff's Department may not have ripened into a contractual one by the time the department told him not to report to work, it is a question I need not decide because the relationship was clearly a prospective economic advantage of the sort protected from tortious interference. That relationship is, however, the only one that appears in the record, notwithstanding the allegations in the complaint concerning interference with job opportunities at other agencies. And, even as to the relationship with the sheriff's department, the record lacks anything of evidentiary quality that describes interference, much less anything that involves fraud or intimidation. Accordingly, the defendants are entitled to summary judgment on this claim.

X. Municipal Immunity from Punitive Damages

Although the Town is not immune from liability on the tort claims that survive the summary judgment motion, the Town, Holt and Afflerbach correctly point out that municipalities are not susceptible to punitive damages pursuant to the relevant provision of the Tort Claims Act, 14 M.R.S.A. § 8105(5). Accordingly, to the extent the plaintiff's state-law tort claims seek punitive damages against the Town, it is entitled to summary judgment.

XI. Conclusion

For the foregoing reasons, on the defendants' motions summary judgment is **GRANTED IN PART** as follows: on Count I (42 U.S.C. § 1983) in favor of all defendants, but only insofar as the

claim seeks recovery for violation of the plaintiff's right to privacy, and in favor of defendants Town of Norway, Holt and Afflerbach, but only to the extent that the claim seeks punitive damages; on Count II (age discrimination pursuant to federal and state law) in favor of defendants Manchester, Holt and Afflerbach; on Count III (defamation) in favor of defendant Town of Norway, but only to the extent that the claim seeks punitive damages; on Count V[15] (invasion of privacy) in favor of defendants Manchester and Holt, and in favor of defendant Town of Norway to the extent that the claim seeks punitive damages; and on Counts VI (infliction of emotional distress) and VII (interference with advantageous relationships) in favor of all defendants; in all other respects the motions are **DENIED**.

Dated this 13th day of November, 1996.

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David M. Cohen
United States Magistrate Judge

[15] The complaint contains no Count IV.